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IN THE

Supreme Court of the United States

October Term, 1962

No. 84

EDWARD M. FAY, Warden, *et al.*,

Petitioners,

—against—

CHARLES NOIA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER

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Opinions Below

The opinion of the District Court denying the application for a writ of habeas corpus appears in 183 F. Supp. 222. The reversing opinion of the United States Court of Appeals, Second Circuit, is reported in 300 Fed. 2d 345. The decisions of the New York Courts relevant to the present issue are reported in 265 App. Div. 960 sub nom. *People* v. *Bonino;* 291 N. Y. 541 sub. nom. *People* v. *Bonino and Caminito*; 297 N. Y. 882 sub nom. *People* v. *Caminito*; 307 N. Y. 686 sub nom. *People* v. *Caminito;* 309 N. Y. 950 sub nom. *People* v. *Bonino;* 1 N. Y. 2d 752 sub nom. *People* v. *Bonino;* 4 App. Div. 2d 697 sub nom. *People* v. *Caminito*; 3 N. Y. 2d 596 sub nom. *People* v. *Caminto and Noia.* Other decisions

relevant to the present issue are reported in 127 F. Supp 689 sub nom. *United States ex rel. Caminito* v. *Murphy, Warden;* 222 F. 2d 698 sub nom. *United States ex rel. Caminito* v. *Murphy, Warden;* 350 U. S. 896 sub nom. *Murphy, Warden, and New York* v. *United States ex rel. Caminito.*

Previous Proceedings

The judgment to which the petition for the writ was addressed was entered in the County Court of Kings County, New York, on March 2, 1942. It convicted appellant, Santo Caminito and Frank Bonino of the crime of Murder in the First Degree in the killing of one Murray Hammeroff during the commission of a robbery. The Court accepted the jury's recommendation of clemency pursuant to Penal Law, Section 1045-a and sentenced all defendants to a term of imprisonment for natural life.

Respondent Noia did not appeal from the judgment. This crucially important fact will be dwelt upon at length in subsequent portions of this brief.

Caminito and Bonino appealed to the Appellate Division of the Supreme Court, Second Judicial Department, which affirmed the judgment (265 App. Div. 960); and upon appeal to the New York Court of Appeals, the judgment was again affirmed (291 N. Y. 541).

At the trial, the jury were instructed concerning all defendants that the sole evidence against them was the confession by each of his participation in the robbery. The jury were further instructed that as respects respondent, his confession admitted that it was he who had fired the fatal shot. The case was submitted to the jury with regard to Caminito and Bonino only on a felony murder theory

and concerning respondent was submitted on both common law and felony murder theories. All defendants testified that their confessions were involuntary and had been wrung from them by police brutality and illegal delay in arraignment. The fact that the jury included respondent in clemency recommendation shows, of course, that he, like his co-defendants, was convicted on the felony murder theory.

In the appeals which followed, Caminito and Bonino urged upon the Appellate Division and the Court of Appeals the involuntary nature of their confessions.

Following the affirmance of the judgment by the Court of Appeals, Caminito made two motions for reargument. Both were denied (297 N. Y. 882; 307 N. Y. 686). His subsequent petition to the United States Supreme Court for certiorari was likewise denied (Black and Douglas, *JJ.* dissenting; (348 U. S. 839)). Caminito then petitioned the United States District Court for the Northern District of New York for a writ of habeas corpus, alleging therein the same ground of coerced confession which he had presented to the State Courts and to the Supreme Court of the United States. The petition was dismissed (Foley, *D.J.*, 127 F. Sup. 689). However, upon the appeal to the United States Court of Appeals for the Second Circuit, the District Court was unanimously reversed and the writ of habeas corpus was sustained (222 F. 2d 698). New York applied to the United States Supreme Court for a writ of certiorari, but the petition was denied (350 U. S. 896).

Bonino, availing himself of the happy result which had accrued to Caminito, moved in the New York Court of Appeals for reargument of its judgment of affirmance

against him. The motion was granted (309 N. Y. 950); and upon reargument the Court reversed the judgment of conviction and ordered a new trial (1 N. Y. 2d 752).

The Supreme Court's denial of certiorari to New York in the *Caminito* case was followed by orders of the Kings County Court dismissing the indictment against him and vacating the judgment against Noia. The People appealed from both orders in a consolidated appeal and the Appellate Division reversed them both, thus effectuating the reinstatement of the indictment against Caminito and the judgment of conviction against Noia (4 App. Div. 2d 697, 698). The Appellate Division's order was affirmed upon appeal by Caminito and Noia to the Court of Appeals (3 N. Y. 2d 596).

In the Court of Appeals, Fuld, *J.* wrote on behalf of a unanimous Court:

> "With regard to the appeal taken by Noia, to which we now turn, the Appellate Division reversed the order of the Kings County Court vacating and setting aside the judgment of conviction against him. As noted above, Noia did not appeal from the judgment of conviction, as had Caminito and Bonino, nor did he seek, as had Caminito, relief by way of habeas corpus in the federal courts. In fact, it was not until June of 1956, after this court had reversed the judgment against Bonino and after the Kings County Court had dismissed the indictment against Caminito, that Noia made the motion resulting in the order now before us. He maintains that he stands in the same position as Caminito and Bonino and that, despite his acceptance of the conviction and his failure to appeal from the judgment, the trial court has 'inherent power' to set aside its own judgment procured in violation of constitutional right.

Not having participated in the appeals prosecuted by his codefendants, Noia is not entitled to the beneficial results that they obtained. Some years ago, we held that the nonappealing codefendants of one whose conviction was reversed on appeal have 'no remedy * * * through the court'; the judgments recorded against them 'stand' and 'they must serve their sentences.' (People v. Rizzo, 246 N. Y. 334, 339). Their only recourse the court observed, was to the Governor for executive clemency.

Nor does the revitalization of coram nobis in this state since 1943 (see Matter of Lyons v. Goldstein, 290 N. Y. 19) change that and afford Noia a remedy in the courts. We have already adverted to the fact that at the trial the defendant claimed that his confessions were procured through coercive methods. The court left that question to the jury and, when its finding proved adverse to his contention and a judgment of conviction was rendered against him, Noia could have had the issue reviewed, as did his codefendants, on appeal and in the subsequent proceedings. His failure to pursue the usual and accepted appellate procedure to gain a review of the conviction does not entitle him later to utilize the present day counterpart of the extraordinary writ of error coram nobis. (see, e.g., People v. Sullivan, 3 N. Y. 2d 196, 198). And this is so even though the asserted error or irregularity relates to a violation of constitutional right. (see Davis v. United States, 214 F. 2d 594, 596 cert. denied 353 U. S. 960; Howell v. United States, 172 F. 2d 213, 215, cert. denied 337 U. S. 906). While the scope of coram nobis has been somewhat expanded beyond its original office (see e.g., People v. Shaw, 1 N. Y. 2d 30; People v. Kronick, 308 N. Y. 856), it still remains an emergency measure employed for the purpose for which it was initially designed, of calling up facts unknown at the time of the judgment. The present, quite obviously, is not such a case."

Respondent then, on February 4, 1960 petitioned the United States District Court for the Southern District of New York for the issuance of a writ of habeas corpus; and on February 5, 1960 an order to show cause why such writ should not issue, directed to appellant warden, the Attorney General of the State of New York and the District Attorney of Kings County was made by Honorable Sidney Sugerman, a United States District Judge.

The District Attorney appeared in opposition on behalf of all parties to whom the order had been issued and filed an affidavit executed by Assistant District Attorney William I. Siegel on February 10, 1960. Presiding on that day was Honorable John N. Cashin, United States District Judge. As a result of the proceedings to this point, hearings were held on March 8, 1960, March 15, 1960 and March 31, 1960 before Cashin, *D.J.*

The District Court took testimony concerning the admitted fact of relator's failure to appeal from the judgment of conviction. Appellant appeared in person and by attorney at the hearing held on March 8th, March 15th and March 31st, 1960. The hearing was afforded appellant in order to give him an opportunity to present to the Court the reasons why he had not appealed from the judgment. The Court rendered its decision on April 8, 1960. In the Court's opinion, reference is made to appellant's claim, advanced at the hearing, that such omission to appeal was due to his indigence. Further reference is made in the opinion to proof adduced in respondent's (now petitioner's) behalf "which tends to show that the relator's motive for not appealing might well have been the fear that on a retrial the death penalty might be imposed". The Court wrote:

> "I prescind from making any finding on this issue since I think it is entirely unnecessary."

The decision to deny the writ of habeas corpus therefore rests squarely upon the fact "of relator's failure to exhaust his State Court remedies" (63, 66).*

The Court of Appeals reversed the order of the District Court upon considerations and for the reasons discussed in the opinion of Waterman, *C.J.*, concurred in by Smith, *C.J.*, Moore, *C.J.* dissenting.

Jurisdiction

The jurisdiction of the District Court was invoked by respondent under Title 28, Section 2254, United States Code. The jurisdiction of this Court is invoked by petitioners under Title 28, Section 2101-d, United States Code, and Rule 22 of the Revised Rules of this Court effective July 1, 1954. The writ of certiorari was granted by this Court May 14, 1962 (369 U. S. 869). Respondent had been admitted to bail of $10,000 by Mr. Justice Jackson on March 22, 1962.

Question Presented

Petitioners contend that the United States Court of Appeals erred in its judgment holding that respondent was entitled under Section 2254 of the United States Code and governing law to have issued to him a writ of habeas corpus; and in overruling the District Court's order which had dismissed the petition for the writ upon the ground that respondent had failed to exhaust his State Court remedies. It is petitioners' contention that respondent, by having failed to appeal to the Appellate Division of the New York

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* Page references herein contained are to the Transcript of Record.

Supreme Court and to the New York Court of Appeals from the judgment of conviction, had foreclosed himself from all Federal relief.

Applicable Statutory Provisions

(1) Title 28, Section 2254, United States Code:

> "An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State Court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.
>
> An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented."

(2) New York Code of Criminal Procedure, Section 517:

> "In what cases appeals may be taken by defendant. An appeal may be taken by the defendant as of right from a judgment of conviction in a criminal action or proceeding as follows:
>
> 1. * * * ;
>
> 2. Where the judgment is other than of death in the City of New York (a) to the Appellate Division of the Supreme Court of the department in which the conviction was had, from a conviction by the Supreme Court or by the Court of General

Sessions of the County of New York or a County Court, or from a conviction by a Court of Special Sessions; (b) to the Appellate Part of the Court of Special Sessions, from a conviction by a City Magistrate;

• • •"

(3) New York Code of Criminal Procedure, Section 519:

"519. Appeal to court of appeals from intermediate appellate court.

Upon the determination of an appeal, other than from a judgment of death, taken as provided in section five hundred seventeen or five hundred eighteen, an appeal may be taken from such determination by any party aggrieved to the court of appeals in the following cases, provided such party obtains a certificate granting permission to appeal, as provided in section five hundred twenty:

1. From a judgment or order affirming or reversing a judgment of conviction, including an order granting a new trial;
2. • • •
3. • • •
4. • • •
5. From a final determination affecting a substantial right of the defendant;
6. • • •"

Record Facts Material to the Question Presented

The Hearings in the District Court

At the hearing on March 8, 1960, no testimony was taken, the hearing being devoted to argument on the question of respondent's right to the issuance of a writ. In substance, his counsel contended that Title 28, Section 2254, United States Code, in referring to the exhaustion of State remedies, meant exhaustion of State remedies available to the defendant at the time of the presentation of the petition for the Federal habeas corpus writ (26). Petitioners answered that on the contrary the Federal statutes' basic requirement of exhaustion of State remedies meant all remedies which at any time in the past had been available to the defendant (31).

On the proceedings on March 15, 1960, petitioners' counsel conceded that with respect to respondent as well as his co-defendants at the trial, the People's case consisted solely of evidence of confessions plus the *corpus delicti* and that the trial Judge had charged the jury that if they did not find the confessions to be voluntary and/or truthful, they were obliged to acquit all the defendants (35).

Testimony was taken at the March 31, 1960 hearing. Respondent, appearing in person and by counsel, testified that he was represented at the Kings County Court trial by Louis J. Wacke, Esq., now known as Louis J. Walker. Following the conviction he did not ask anyone to file a Notice of Appeal in his behalf because of lack of funds and a disinclination to impose further upon his family, who were likewise financially unable to finance an appeal. He knew nothing of any right to appeal as a poor person (41) except where sentence was of death (42). His relative, Caesar

Cirigliano, a lawyer, later visited him in Sing Sing and told him that no Notice of Appeal had been filed in his behalf (44).

Respondent, however, conceded under cross-examination that Mr. Walker had visited him in the jail during the thirty-day period following the judgment of conviction during which he could have appealed. There was talk of such an appeal; but according to respondent, "he was talking about an appeal, but at the time I did not want an appeal" (44). This was due to his lack of funds (45).

Mr. Walker testified under call by petitioners. His practice from 1927 when he was admitted to the bar, to 1942 when he represented respondent, was substantially a criminal practice (46). He visited respondent in the Raymond Street jail during the thirty day period in which a Notice of Appeal could have been filed. Caminito and Bonino had decided to appeal from the judgment (48) and Mr. Walker asked respondent if he wished that the same step be taken in his behalf, Mr. Walker being of the opinion that "an appeal would result favorably to his case" (48). Respondent negatived the suggestion. The reason given by him to Mr. Walker goes to the very nub of the present case (49).

> "A. (Continuing) My recollection is that he gave me a couple of reasons why he did not want to appeal.
>
> Q. Do you remember what those reasons were? A. One of them was that he felt that if there was a reversal and a new trial was ordered, maybe the next jury would not recommend mercy.
>
> He also told me, in substance, that his family was very financially embarrassed and had no funds, but I do not think that was gone into too deeply. He did not want to appeal. That was it."

Mr. Walker also testified that he had advised respondent of his right to apply to the Appellate Division which upon showing of merit would permit the appeal to be heard on original typewritten records and would also assign counsel (51-52).

Respondent, according to Mr. Walker, was familiar with a contemporaneous case in which a defendant, Hull, had appealed a judgment of conviction for Murder in the First Degree with a recommendation, and upon re-trial was again convicted of that crime without a recommendation (54):

> "Q. Who proposed the Hull case to him first? A. I do not remember. I remember it was discussed. I remember every question that this man asked me as to his position, what would happen if a reversal came, could it happen like that case, maybe he would go to the chair on the second trial, and whatever was discussed I gave him a legal answer."

Finally, Mr. Walker testified, he offered to file a Notice of Appeal for respondent if he should decide within thirty days to do so. No request was ever made that it be done (56).

Respondent, recalled, denied having discussed the Hull case with Mr. Walker or having told the lawyer that his reason for not wanting to appeal was fear of the electric chair (57).

The District Court, in its opinion and decision dismissing the writ (183 F. S. 222), fully reviewed the history of the litigation with respect to all defendants, Caminito, Bonino and Noia from the time of the trial in the Kings County Court to the beginning of the instant petition for a writ of

habeas corpus by Noia. The Court also analyzed the testimony at the hearing before it. It concluded that indigency alone does not excuse a State-Court defendant's failure to appeal from a judgment of conviction. *United States ex rel. Kozicky* v. *Fay*, 284 F. 2d 520. As to the requirements of Title 28, Section 2254, United States Code, for the exhaustion of State remedies as a condition precedent to the invocation of Federal jurisdiction, the District Court held (59):

> "In one sense, of course, the relator has exhausted his state court remedies since there is no proceeding available to him in the State, apart, of course, from executive clemency, which can effect his release from a patently unconstitutional detention. However, exhaustion of state court remedies does not only mean that at the time of the petition before the Federal District Court there is no remedy available in the State. It further means that the relator has availed himself of at least one corrective process available in the courts of the state if there be such a process. (Ex parte Hawke (1944), 321 U. S. 114; Brown v. Allen (1953), 344 U. S. 443). That there was a state court process available to the relator is obvious since the codefendants have obtained their releases."

The District Court refrained from making any finding of facts concerning respondent's contentions of poverty or with respect to the proof that, on the contrary, his failure to appeal was voluntary and due to a fear of possible results. Its dismissal of the writ rested solely on the basis that (66):

> "On the reasoning in the authorities cited above I feel constrained to dismiss the writ because of relator's failure to exhaust his state court remedies."

ARGUMENT

POINT I

The petition for the writ of habeas corpus was properly denied on the ground that respondent, having failed to exhaust his state remedies, was not entitled to the writ. The Court of Appeals erred in reversing the order dismissing the petition.

Respondent's deliberate omission to appeal from the New York judgment of conviction is the pivot upon which the case at bar turns. It is our position that respondent's failure to avail himself of the remedies provided by New York's Laws granting the right of appeal (Code Crim. Pro. Sections 517, 519) automatically debarred him from invoking the Federal writ of habeas corpus. United States Code, Title 28, Section 2254 explicitly requires the exhaustion of State remedies as a condition precedent to an application for the writ. The section is a codification of the rule firmly established by this Court long prior to its enactment. In *Ex Parte Hawke*, 321 U. S. 114, this Court, in denying an application for leave to file an original petition for the writ, wrote:

> "The denial of relief to petitioner by the Federal Courts and Judges in this, as in a number of other cases, appears to have been on the ground that it is a principle controlling all habeas corpus petitions to the federal courts, that those courts will interfere with the administration of justice in the state courts only 'in rare cases where exceptional circumstances of peculiar urgency are shown to exist' (citing)."

Indeed, the Revisor's note to Section 2254 points out that the section is "declaratory of existing law as affirmed by

the Supreme Court (see Ex parte Hawke, 1944, 64 S. Ct. 448, 321 U. S. 114, 88 L. ed. 572)."

This Court has not departed from the rule, the entire current of cases decided since the enactment of Section 2254 being in strict and literal conformity with the principle enunciated in *Ex Parte Hawke, supra.* The later reiteration and enforcement of the exhaustion requirement in *Brown* v. *Allen*, 344 U. S. 443, 97 L. ed. 469, 73 S. Ct. 397, illustrates its compelling force. In *Brown*, this Court was faced with a situation which, if any state of facts could justify a relaxation of the rule, constituted such justification. The appeal of a defendant under sentence of death in a State Court was dismissed by the State's highest Court because his attorneys had not served the proper statement of the case until *one day* after lapse of the required period for such service. In upholding the denial of the writ of habeas corpus, this Court wrote:

> "The writ of habeas corpus in federal courts is not authorized for state prisoners at the discretion of the federal court. It is only authorized when a state prisoner is in custody in violation of the Constitution of the United States. 28 U.S.C. Sec. 2241. *That fact is not to be tested by the use of habeas corpus in lieu of an appeal.* To allow habeas corpus in such circumstances would subvert the entire system of state criminal justice and destroy state energy in the detection and punishment of crime. * * *
>
> Finally, federal courts may not grant habeas corpus for those convicted by the state except pursuant to Section 2254. * * * The statute requires that the applicant exhaust available state remedies. *To show that the time has passed for appeal is not enough to empower the Federal District Court to issue the writ.*" (Italics ours)

Not long after *Brown*, this Court considered the same question in *Michel* v. *Louisiana*, 350 U. S. 91, also a capital case. The defendant had failed to comply with State procedure in that he had not objected to the legality of the Grand Jury (on the ground of systematic exclusion of Negroes from the panel) during the three judicial days following the end of the Grand Jury's Term. Even though he did so on the fifth day, this Court refused to entertain the case despite the dissent by Mr. Justice Black in which he asserted that historically only one Negro had ever been selected to serve on a Grand Jury in that parish.

It is notable that in both *Brown, supra*, and *Michel, supra*, the State Court defendants had at least attempted to fulfill State procedural requirements and had failed only narrowly to do so with complete sufficiency. Respondent in the case at bar has by contrast voluntarily and completely refused to avail himself of the appeal rights which were his absolutely under Code Crim Pro. Section 517 and conditionally under Section 519.

The United States Court of Appeals for the Second Circuit has in its decisions heretofore paralleled the rulings of this Court in governing itself according to Section 2254 (*United States ex rel. Martine* v. *Martin*, 174 F. 2d 582; *United States ex rel. Williams* v. *LaVallee*, 276 F. 2d 645, cert. den. 364 U. S. 922; *United States ex rel. Kozicky* v. *Fay*, 284 F. 2d 520; *United States ex rel. Kling* v. *LaVallee*; 306 F. 2d 216). Indeed, in *Kozicky, supra*, Waterman, *C.J.* (the author of the majority opinion in the case at bar) wrote for a unanimous Court:

> "If the State provided such a remedy, (i.e., an appeal) and the petitioners failed to take advantage of of it, we hold they cannot obtain a writ of habeas

> corpus from a Federal Court. This result is a necessary consequence of 28 U.S.C.A. Section 2254. • • • But, where the failure of the prisoner to obtain relief is due to his own inaction, 28 U.S.C.A. Section 2254 prohibits intervention by the Federal Courts."

Williams, supra, and *Kling, supra,* illustrate the literal strictness with which the rule has been applied. In *Williams,* the State defendant did in fact appeal to this Court upon a constitutional question certified by the New York Court of Appeals. He did not, however, procure a certification of the question of coerced confession to be presented on the appeal, nor did he seek certiorari in order to present that question to this Court. He contented himself with presenting to this Court only the question certified by the State Court of Appeals as to whether or not a sentencing Court may utilize ex-parte evidence in order to determine if it should follow the jury's clemency recommendation in a capital case. The Second Circuit held:

> "In so limiting the issues assigned counsel for relator made the choice of assuring their client, as a matter of right, Supreme Court review of the one appropriate question (sentencing procedure) rather than risking discretionary certiorari review of both federal questions (sentencing procedure plus coercion). That choice resulted in a failure to exhaust state remedies because the remaining question, having been previously heard by the state courts, should have been thereafter offered for review to the Supreme Court. This was not done and hence the coercion question was not properly before the District Court. Darr v. Burford, 239 U. S. 200 (1950); Ex parte Hawke, 321 U. S. 114 (1944)."

In *Kling, supra*, the Second Circuit held that a New York State convict was not entitled to the Federal writ of habeas corpus because he had not moved in the Appellate Division to vacate that Court's order dismissing his appeal from an order denying a motion in the nature of the writ of error coram nobis; the dismissal occurring after the Court had on the ground of lack of merit in his appeal denied his motion for leave to proceed as a poor person. The Second Circuit pointed out that as a result of decisions in the New York Court of Appeals (*People* v. *Borum*, 8 N. Y. 2d 177), the Appellate Division in a long line of cases had:

> "granted all motions to vacate its previous orders dismissing appeals which were entered after the appellant had first moved unsuccessfully for leave to appeal as a poor person." (Citing among others, *People* v. *Abair*, 13 App. Div. 2d 802.)

The Second Circuit wrote:

> "In any event, as long as this remedy is available, we believe Kling should not pursue Federal habeas corpus. This is not an exercise in futility and frustration. It is a recognition of the principle that 'it would be unseemly in our dual system of government for a federal District Court to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation * * *'. (Darr v. Burford, 339 U. S. 200, 204, 1950; see United States ex rel. Buckley v. Wilkins, 2d Cir., June 15, 1962, and cases cited therein). Therefore, we hold that Kling has failed to exhaust his available state remedies within the meaning of 28 U.S.C., section 2254, and that his petition must be dismissed for that reason (cf. United States ex rel. Allen v. Murphy, 295 F. 2d 385, 386, 2d Cir., 1961)."

True, the rule has been relaxed on rare occasions, but only under strictly limited circumstances. *Thomas* v. *Arizona*, 356 U. S. 290; *Frisbie* v. *Collins*, 342 U. S. 519. This Court in *Brown* v. *Allen*, *supra*, itemized the limited instances of exception:

> "Of course, federal habeas corpus is allowed where time has expired without appeal when the prisoner is detained without opportunity to appeal because of lack of counsel, incapacity, or some interference by officials."

See *Dowd* v. *Cook*, 340 U. S. 206; *Johnson* v. *Zerbst*, 304 U. S. 458.

The Second Circuit added these other exceptional cases in *Williams*, *supra*:

> "That exception generally applies where the State determination is on non-federal grounds, e.g., a procedural bar within the state appellate process, from which certiorari jurisdiction cannot be invoked. White v. Ragan, 324 U. S. 760 (1945). It may also apply in certain situations, not applicable to the instant petition, where the State has been tardy in objecting to the federal proceedings or where the circumstances are such that prompt federal intervention is essential."

Respondent brought himself within none of the exceptional cases enumerated in *Brown* v. *Allen*, *supra* and *Williams*, *supra*.

In his brief in the Court below he urged that his failure to seek appellate review in the New York Courts should be excused because of the existence of "a combination of factors, viz. lack of funds to retain counsel, defendant being upset at the time of his last interview with counsel

after the verdict, the failure of counsel to undertake the appeal without payment despite his belief in his client's innocence." A synonymous restatement of this plea would be (1) indigency; (2) inability to make a clear choice; and (3) lack of counsel. In anticipation that the same claims may be pressed upon this Court, we answer them *seriatim*.

(1) Even if the record of the hearing in the District Court sustained a claim of indigence,—which it does not,—the Second Circuit itself has held in *United States ex rel. Williams* v. *LaVallee, supra*.

> "In any event, indigence is not the extraordinary circumstance envisaged as the exception to the rule of Darr v. Burford, *supra*."

Accord:

United States ex rel. Kozicky v. *Fay, supra*.

The District Court, although refraining from making a finding of fact on this issue, did state in its opinion:

> "that absolutely no evidence of the indigency of relator's family was adduced at the trial except the relator's conclusory statement, despite the fact that there were several spectators at the hearing who were presumably relatives of the relator. In addition, absolutely no explanation was offered by relator for his failure to proceed to adduce any such evidence of indigency."

(2) The plea of "inability to make a clear choice" has no foundation other than the statement of his trial counsel in the District Court that respondent was "upset by the jury's verdict" (53). Surely this observation by counsel, —even if it was an accurate description of respondent's

emotional condition,—is an insufficient basis upon which to permit an infraction of the rule of exhaustion of State remedies, by now decades old. To do so would indeed be to set but little store upon the weighty principles, involving the very federal structure of this nation, upon which the rule has always been grounded.

(3) The assertion that respondent did not appeal from the judgment of conviction because of lack of counsel is refuted by the record. His trial counsel testified in the District Court that although he had discussed the matter of an appeal with respondent during the period when an appeal would be timely, and although he had expressed the opinion that "an appeal would result favorably to his case" (48), appellant had refused to appeal. One of the reasons for that refusal was "that his family was very financially embarrassed and had no funds (49)." Significantly however, counsel added: "But I do not think that was gone into too deeply. He did not want to appeal. That was it" (49). Counsel also testified that he had informed respondent that under the practice of the Appellate Division, the appeal could be heard on original typewritten records and that the Court would assign counsel (51-52). The real reason for respondent's disinclination to appeal lay, of course, in his fear that upon re-trial he might be sentenced to death (49).

The rule requiring exhaustion of State remedies as an absolute prerequisite to the issuance of the Federal writ of habeas corpus was developed by this Court, and ultimately codified by Congress into Section 2254, because of constitutional considerations of utmost importance. In *Darr* v. *Burford*, *supra*, the Court thus expounded the pur-

pose and effect of both the original 1867 habeas corpus statute and the exhaustion of State remedies doctrine:

> "This favorable attitude toward procedural difficulties accords with the salutary purpose of Congress in extending in 1867 the scope of federal habeas corpus beyond an examination of the commitment papers under which a prisoner was held to the 'very truth and substance of the causes of his detention'. Through this extension of the boundaries of federal habeas corpus, persons restrained in violation of constitutional rights may regain their freedom. But since the 1867 statute granted jurisdiction to federal courts to examine into alleged unconstitutional restraint of prisoners by state power, it created an area of potential conflict between state and federal courts. As it would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation, the federal courts sought a means to avoid such collisions. Solution was found in the doctrine of comity between courts, a doctrine which teaches that one court should defer action on causes properly within its jurisdiction until the courts of another sovereignty with concurrent powers, and already cognizant of the litigation, have had an opportunity to pass upon the matter."

Mr. Justice Frankfurter expressed it with his usual felicity of phrase in *Irvin* v. *Dowd*, 359 U. S. 309, 408:

> "Something that thus goes to the very structure of our federal system in its distribution of power between the United States and the States is not a mere bit of red tape to be cut, on the assumption that this court has general discretion to see justice done. Nor is it one of those 'technical' matters that laymen, with more confidence than understanding of our constitutional system, so often distain."

Mr. Justice Harlan thus stated the rule in the same case:

> "It is clear that the Federal Courts would be without jurisdiction to consider petitioner's constitutional claims on habeas corpus if the Supreme Court of Indiana rejected those claims because irrespective of their possible merit, they were not presented to it in compliance with the State's 'adequate and easily-complied-with method of appeal.' Brown v. Allen, 344 U. S. 443, 485 (339 U. S. at 412-13)."

In the face of the strong *caveat* expressed in Section 2254, in the decisions of this Court, in its own decisions, and despite the constitutional doctrine of high import involved, the Court below by its majority has nevertheless held respondent to be entitled to be succored by the Federal writ from the consequences of his affirmative refusal to avail himself of State remedies. The question presents itself: Why this departure from principle and practice?

The majority of the Court examined three bases upon which to consider the problem and through which to reach a result running counter to all previous authority. We analyze them *seriatim*.

The majority, referring first to what it termed the problem of waiver, wrote (73):

> "The first question before us is whether inasmuch as his conviction was not appealed, Noia waived his undeniable constitutional right of being tried without his coerced confession in evidence. The answer to this question is to be determined according to federal law."

With great deference to the learned majority, it is our submission that this constitutional right to be tried free

of a coerced confession was not the right involved in the case. What was involved was the right to avail himself of the absolute State right to appeal from the judgment of conviction,—a *right* which at the same time was transmuted into an *obligation* to appeal by the doctrine of exhaustion and by Section 2254. While the majority's learned discussion of the abstract doctrine of waiver may be accurate in those cases to which it applies, it is beside the point with respect to the state of facts before the Court. Again with great respect to the learned majority, we believe that the weakness in their application of the doctrine of waiver is pointed up by the amplification thereof in the opinion which now follows (75):

> "At the time Noia made his choice not to appeal, he had just been convicted by a New York court and jury solely upon the confession which had been wrung from him. But it was not at all clear that Noia could convince an appellate court of the unconstitutionality of his treatment. The police at the trial only admitted to extracting his acknowledgment of guilt by methods far more subtle than brute force. And even if Noia had succeeded in obtaining a reversal, he faced the possibility of a new trial in which he might be convicted again and receive the death penalty instead of life imprisonment. He had just received very shoddy treatment at the hands of the New York police—treatment that he then believed was approved by judicial authorities. Why should he expect a better brand of justice from the same authorities in the future? The posture of his case was far different immediately following the trial than it is now as a result of the intervening event which we have outlined above. We cannot believe that Noia would consciously and willingly have surrendered his constitutional right had he known

> then what he knows now: that there had been an undoubted violation of this right and the rectification of the wrong done him would mean his freedom, not his death. Perhaps Noia should be denied relief for some other reason, which we will discuss presently, but surely not because of any conscious or intentional waiver on his part of a right known to him to have his conviction set aside because that conviction had been obtained by depriving him of a constitutional right."

We ask: Since when has it rested with a criminal defendant to estimate the degree of probability of "even-handed administration of justice by the Courts? By what doctrine of either law or ethics is a criminal defendant to be empowered to prophesy the ultimate resolution of a judicial problem by the Courts? To put it with due mildness, a society in which the judgment and discretion of a criminal defendant on such fundamental problems is sufficient to oust State Legislatures of their functions and powers, and State Courts of their jurisdiction, would be a society based on anarchy rather than on order. We cannot hope to improve upon either the rationale or the expression of Judge Moore's dissent in the Court below; and therefore we quote from it *in extenso* (112):

> "The opinion of the majority could have been written in one sentence substantially, as follows: 'In any criminal case in a State court wherein a confession was introduced and a conviction resulted, the defendant may, at any time thereafter without appealing such conviction or exhausting any other available state remedy, claim upon petition for a writ of habeas corpus that such confession was coerced and, upon a finding to that effect by a federal judge, a writ shall issue to the State directing the defendant's

release from custody (citing cases if there be any).' If this is to be the rule of law, is not a reappraisal of our criminal procedure in this field called for? If the delicate balance of the State-Federal relationship is to be upset, possibly the majority's approach is best, namely, upset it drastically. If each case is to be decided on its own 'exceptional situation' basis, let this principle be declared so that consideration of the scores of habeas corpus appeals which come before this court every year can be unfettered by legal principles. No longer will it be necessary after due deliberation to write 'Failure to exhaust State remedies' or 'No federal question.' And in fairness to the two distinguished appellate courts in New York, would it not be better to advise them that in any case before them involving a coerced confession they are but puppets whose strings may be cut at any time by the keen edge of the 'Great Writ'. It may well be that there should be a definite rule that no case involving an allegedly coerced confession should be tried in a state court or, stated differently, that such a case should be tried only before a federal judge. Whether this should be is for those far more learned in such matters than I to determine. I point out only that such is not the law at the present time—at least until the filing of the majority opinion.

I would affirm.

The majority of the Courts below then considered that aspect of the case involving the exhaustion of State remedies and concluded (86):

"We believe that if there are facts in a case so unique as to make an independent state ground of decision, elsewhere reasonable and adequate, inade-

> quate in that particular case to bar federal habeas corpus, those facts are likewise sufficient to create an exceptional case within the contemplation of section 2254 so as to permit the issuance of the federal habeas corpus writ."

Here again Judge Moore's dissent is, we submit, unanswerable (108):

> "I do not contend that state procedural grounds for denying a hearing to federal claims must always be considered adequate to preclude federal review of that claim. Certainly, a procedural ground will not bar federal review if the state procedure discriminates against the assertion of federal claims, Williams v. George, 349 U. S. 375, 1955; Ward v. Love County, 253 U. S. 17, 1920; NAACP v. Alabama, 357 U. S. 449, 1958, or unreasonably prevents the assertion of federal rights, Davis v. Wechsler, 263 U. S. 22, 1923; Rogers v. Alabama, 192 U. S. 226, 1904; Reece v. Georgia, 350 U. S. 85, 1955; Staub v. City of Baxley, 355 U. S. 313, 1958. However, inadequacy must be determined according to principles established by the Supreme Court. Since Daniels v. Allen has established that the failure to take an appeal is a reasonable ground for a state's refusal to entertain constitutional claims, we should not now hold that the failure to appeal is not a reasonable ground for denying a hearing to such claims unless the petitioner did not have an 'opportunity to appeal because of lack of counsel, incapacity, or some interference by officials.' Daniels v. Allen, 344 U. S. at 485. However, the petitioner here had a hearing before the district court at which he was afforded an opportunity to present facts which might have excused his failure to appeal. After weighing the proof, the district court found that 'the hearing utterly failed to reveal any such circumstances.'"

Lastly, the majority turned to that phase of the case which they denominated as "the independent and adequate State ground of decision". An examination of the opinion, however, compels the conclusion that the majority were really discussing the adequacy of State avenues of relief *presently available* to respondent at the time of the initiation of his right of habeas corpus petition. Their conclusion was expressed in striking language (91):

> "Thus we come to the last scene in this human drama. Is there an adequate state ground in this case dooming relator to life imprisonment? Our answer is No; the state ground here is inadequate. We must realize that adequacy is a term of relativity. No state ground is entitled to unqualified deference. As we noted in the last paragraph, for the state ground to be adequate, it must be reasonable."

We have called this quotation "striking language". With great deference to the majority of the Court below, it is our submission that striking as the language is, it is at the same time an expression of a human reaction completely unsupported by either legal principle or judicial precedent. As Moore, *C.J.* in his dissent recognized (105):

> "Thus, the majority has 'come to the last scene in this human drama' 'dooming relator to life imprisonment.' Legal principles having failed to produce the desired result, resort must be had to a tour de force by the fiat that 'No state ground is entitled to unqualified deference' and 'adequacy' in any event is but 'a term of relativity'. After all, 'for the state ground to be adequate, it must be reasonable,' and what could be more unreasonable than requiring a defendant to appeal?

> From here on the denouement comes rapidly. The 'simple failure to appeal, reasonable enough to prevent federal judicial intervention in most cases, is in this particular case unreasonable and inadequate'."

We have, we submit, demonstrated that the majority decision in the Court below runs counter to the expressed requirements of Section 2254 and to the entire body of decisional law in this Court—and, indeed, to its own decisions. Judge Moore's dissent correctly assays what the record and the majority opinion itself demonstrates to be the reason for the controlling decision: that Noia's parlous position, contrasted with the present freedom of his co-defendants, warrants an extraordinary departure from a fundamental rule. We do not say to this Court that there does exist any degree of difference in guilt, or freedom from guilt, among the three original defendants. We do, however, strongly urge that—unless this case is to be decided upon the justice of Haroun Alraschild and not upon the basis of settled law—there has always been a pertinent and controlling difference between the procedures of Bonino and Caminito on the one hand and the procedure of this respondent on the other. We urge with equal emphasis that the difference should be implemented, not as a right of the co-defendants who have no interest in this litigation, but as a right of the State of New York whose very sovereignty is, in the important aspect of its judicial system, strongly affected: strongly and adversely by the proceedings to this point, but, we hope, strongly and beneficially affected by the ultimate decision of this Court.

We cannot believe that appellant finds, or can find, in the decision of the Court below so secure a foundation as to rest content with it as a guarantee of ultimate success in this Court. Our prophetic instinct therefore suggests to us that he will urge upon this Court that it reverse *Ex Parte Hawke, supra, Brown* v. *Allen, supra,* and all the other cases in which the rule of exhaustion of State remedies has been announced and followed; and that the Court, having reversed it, enunciated a new rule in conformity with the opinion of the majority of the Court below.

That appellant should so argue would not be surprising since this would be a repetition of his argument in the Court of Appeals. We do not, however, anticipate that he would here succeed.

Section 2254 stands as a bar to the fruition of the argument; and for the Court to disregard the Statute would constitute an act of judicial legislation foreign to the history of this tribunal.

Moreover, nothing in respondent's case entitles him as an individual to such a major innovation. We realize that there is no mathematical equation which can serve as a basis for the establishment of constitutional or statutory law. Nevertheless, it is a fact that the seven Judges of the New York Court of Appeals unanimously differed from the two Federal Judges herein involved in their judicial reactions to the exigencies of respondent's situation (see opinion of Fuld, *J.*, for a unanimous Court, 3 N. Y. 2d 596, p. 4, *supra*).

And finally, it is beyond the need of argument that the sovereignty of the States, of maximum importance in the Federal structure of this nation, should not be infringed

upon or diminished except upon compelling necessity, determined to exist within the framework of constitutional law. Such necessity does not exist. The rule of exhaustion of State remedies, having worked well for upwards of a quarter of a century (*Ex Parte Hawke, supra*), should not now be changed solely for the reasons relied upon by the majority of the Court below.

POINT II

The order appealed from should be reversed and respondent should be remanded to the custody of the petitioner under the original judgment of conviction of the Kings County Court.

Dated: Brooklyn, New York,
October 1962.

Respectfully submitted,

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